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Supreme Court, U.S.
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No. 90-1265

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MICHAEL P. OSHATZ, PETITIONER

against

UNITED STATES OF AMERICA

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BY PETITIONER TO BRIEF IN OPPOSITION

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Questions Presented for Review

1. Whether petitioner's Sixth Amendment rights were violated by district court's rulings, during cross-examination of prosecution's key witness, which excluded critical defense exhibits and prevented a significant line of inquiry which would have showed bias on his part because of his strong financial interest in pleasing prosecution.

2. Whether, if petitioner's Sixth Amendment rights were violated, such error was nevertheless harmless beyond a reasonable doubt.

3. Whether district court's decision to allow the prosecution to ask guilt assuming hypothetical questions on cross examination of petitioner's character witness, and the court of appeals' violation of its own "clear" rule (and that of almost all other Circuits) against such cross-examination, violated petitioner's

right to presumption of his innocence.

4. Whether admission of prosecution's "summary chart", under circumstances which violated clear Second Circuit precedent and the standards of Fed. R. Evid. 1006, together with a number of other erroneous evidentiary and procedural rulings by the district court, prevented petitioner from having a fair trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A77) is reported at 912 F. 2d 534. Opinions of the district court are reported at 700 F. Supp. 696, 704 F. Supp. 511 (Pet. App. E143-E159, and 715 F. Supp. 74.

JURISDICTION

The judgement of the court of appeals

was entered on August 23, 1990. A petition for rehearing was denied on October 10, 1990. The petition for a writ of certiorari was filed on February 5, 1991, more than ninety days after entry of the order denying a rehearing. However, the Court has reserved to itself the right to extend the time to file a petition for a writ of certiorari. See, e.g. Rule 13.2 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

COMPLIANCE OF REPLY BRIEF WITH SUPREME COURT RULE 24.2

Supreme Court Rule 15.6 provides, in part, that "[a] reply brief addressed to arguments first raised in the brief in opposition may be filed by any petitioner ..." Respondent, despite the admonition to the contrary contained in Supreme Court Rule 24.1(a), has changed the substance of two questions presented for re-

view by petitioner and raised two additional questions by virtue of splitting one of the original questions into two parts. It would appear the necessity to point out and explain respondent's actions and respond to the arguments raised by it with respect to its own version of the questions presented for review qualify under the above quoted language of Supreme Court Rule 15.6

BRIEF IN OPPOSITION DOES NOT COMPLY WITH SUPREME COURT RULE 24.2

Supreme Court Rule 15.6 stresses the importance this Court attributes to a brief in opposition "...in assisting the Court in the exercise of its discretionary jurisdiction." The Court not only expects arguments for denying the petition but also advice with respect to ",,,perceived misstatements of fact or law...." The Court has provided respondent with the task of assuring accuracy

so the Court may utilize its time as efficiently as possible. However, it is beyond purview that the Court does not expect respondent to provide misinformation or disinformation. Otherwise, the Beverse of what the Court desires from respondent's assistance will occur - issues the Court would normally accept will be turned down.

A. Improperly Changes the Substance of Questions Already Presented

Respondent has edited and restated the questions presented by petitioner for review to such an extent as to fly in the face of the admonition in Supreme Court Rule 24.1(a) which provides, in part, "...the brief [filed by a respondent] may not raise additional questions or change the substance of the questions already presented [for review]...." Consequently, petitioner, in an abbreviated form, has again posed the questions originally

presented by him for review by the Court.

1) Petitioner's first question which related to the Confrontation Clause referred to both exclusion of critical exhibits and prevention of a significant line of questioning of the government's key witness. Pet. I. Respondents edited version of the same question completely ignores "significant line of questioning" portion of the question. Res. (I).

2) Respondent completely ignores petitioner's second question relating to the harmless error analysis required if the Court decides for the petitioner on the first question. Pet. I and Res. (I)

3) Respondent's second question is a reasonably fair presentation of petitioner's second question. Res. (I). However, it must be pointed out that respondent maintains petitoner did notpresent this question for review. Res. 7.

4) Petitioner's fourth question

alleges the the admission of prosecution's "summary chart" was error and that error, in conjunction with a number of erroneous evidentiary and procedural rulings, prevented petitioner from having a fair trial. Pet. III-IV. Respondent breaks this single question into two seperate questions in an attempt to eviscerate the importance of the question. It poses one question as whether the admission of the chart was reversible error. The other one is posed as whether "any other errors that may have occurred denied petitoner his right to a fair trial. Respondent's editing completely misinforms this Court and grossly prejudices petitioner.

A. Inappropriately Implies Inaccuracy or Ommission in Petitioner's Statement

Supreme Court Rule 24.2 provides respondent does not have to provide a statement of the case unless it desires to

"correct any inaccuracy or omission." Respondent's brief points out neither inaccuracy or omission; neither does it it contain any matter not covered by the petition. Other than two short paragraphs of facts, respondent's Statement is a four page synopsis of the court of appeals' actions. This does appear to comply with Supreme Court Rule 24.1(g) which requires "[a] concise statement of the case containing all that is material to the consideration of the questions presented...."

RESPONDENT'S STATEMENT

A. Ignores Petition Invokes Third Reason for Court's Consideration Under Supreme Court Rule 10.1(a)

Supreme Court Rule 10,1 indicates, in part, that review on a writ of certiorari is not a matter of right but a matter of judicial discretion. Sub-

paragraph (a) of the rule indicates the character of one of the reasons that will be considered is "When a United States court of appeals...has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

It would appear, respondent's task is to support the court of appeals with cogent analysis and argument, not merely by respondent's approval. The thrust of petitioner's petition for a writ of certiorari is the district court dramatically departed from the accepted course and usual course of judicial proceedings, the court of appeals sanctioned such departure and itself independently made such a departure.

The language of the court of appeals case is frequently internally incomsis-

tent. The most obvious example is its treatment of its own decision in United States v. Morgan, 554 F.2d 31 (2d Cir.), cert. denied, 434 U.S. 965 (1977). While respondent accurately points out the court of appeals did say that there was "arguably an ambiguity" [Emphasis supplied] as to the propriety of the prosecutor's questions, respondent failed to point out the court of appeals began its analysis by averring, "We think Morgan is quite clear in its condemnation of guilt assuming hypothetical questions asked of lay character witnesses like friends or neighbors, whether testifying about a defendant's reputation for a character trait or expressing an opinion about such trait. What could be more inconsistent?

The court of appeals put in the language so eagerly quoted by respondent in order to justify the district court's de-

parture from the norm and then found the error "harmless" because it couldn't, in good conscience, agree with the district court. It justifies its harmless analysis by pointing out that the jury was given curative instructions and that, at least once, the judge asked the prosecution to change a question. The curative instructions were given approximately three weeks after petitioner's character witness testified; and there were no changes of questions allowed with respect to this witness. This would also appear to be a dramatic departure from the norm.

B. Inaccurately Depicts Content of Petition for Writ of Certiorari

Respondent continually ignores the portion of petitioner's Sixth Amendment argument which relates to preventing a significant line of inquiry designed to demonstrate that the prosecution's key witness had substantial reason to lie

because of his enormous financial interest in pleasing the prosecution. Res. 4-5. It was the very testimony that respondent takes so much comfort in (that he had forfeited all his possessions to the government) that the district court prevented petitioner from testing. At the of trial, Markowitz already owed the government over $7,000,000 in back taxes, interest and penalties. The records indicated that he had paid barely $300,000 of his debt - yet he testified himself that he had made a number of millions from his illegal activities. Pet. 30-31.

Respondent indicates the district court understood it had discretion under Fed. R. Evid. 608 to admit the evidence regarding Markowitz's transactions (Res. 4-5), including those with the government (Pet. 29-30). Yet, the district court clearly indicated that it believed it did mot have any discretion. Pet. App. D115.

Respondent's "analysis" of petitioner's argument regarding admission of the prosecution's "summary chart" is that the chart was published to the jury before demonstration of the accuracy of the method by which the prosecution prepared the chart. Respondent then notes the chart was not admitted before the government made its proof. Petitioner cannot resist pointing out that not only was the chart admitted (subject to the prosecution proving its accuracy - which never occurred) but it sat before the jury for approximatley ten days while petitioner was forced to test the chart, without any serious assistance from the prosecution, at enormous cost (three accountants, full time, with no days off).

The ten days proved nothing. It was apparent the Internal Revenue Service Agent was told to reach a result - and that is precisely what he did. He did

not even keep the tapes from his calculations; this is very unusual for an accountant. He also admitted the knew little or nothing about the securities industry and had no assistance in this monumental job of analyzing thousands of trades made over a period of almost four years. Pet. 45.

Respondent finishes his "Statement" with the following sentence, "The court held that petitioner was not prejudiced becau/e he had amnple time during trial to check the chart and cross-examine government witnesses concerning any erors, and because the chart was not actually admitted until all the errors on the chart were corrected." Res. 5. The last phrase of the sentence is so disengenuous as not to be worthy of further comment.

However, it is worthy of note that the district court cut off the inquiry after ten days as being unfair to both it

and the jury. The fair thing would have been to strike the chart. The district court refused to strike what it referred to as the government's "tottering chart". Instead, it invited the government to withdraw the exhibit, inquiring whether the prosecutor still wanted to " go forward...and take our chances " with the chart. Pet. 45-46. The district court offered to declare a mistrial if the government wanted it (totally ignoring petitioner's constant requests for a mistrial.) This state of affairs, and so many other errors set forth herein, in the petition for a writ of certiorari and throughout the entire record would seem to be more than adequate to demonstrate that both the district court and the court of appeals "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call

for an exercise of this Court's power of supervision."

Ten days of trial were completely wasted because the district court saw fit to ignore the Federal Rules of Evidence. The cost to the federal government and petitioner was enormous. Rules of evidence, particularly Fed. R. Evid. 1006, were created precisely to prevent this sort of situation.

It is time the courts stopped this sort of gamesmanship. As long as it is tolerated, the prosecutors will utilize the credibility that comes with their position to push the courts to the outer limits. Petitoner in no way means to infer this type of behavior should be tolerated from the defense bar.

in any event, the chart was never proven to be close to accurate. It was never clear that the Internal Revenue Service Agent did anyrhing other than

achieve the result he was instructed to.

RESPONDENT'S ARGUMENT

A. Ignores Most of Sixth Amendment Argument by Changing Substance of Question Posed

This Court has said many times that the right to cross-examine witnesses is perhaps the most important right covered by the Confrontation Clause. Mattox v. United States, 156 U.S.237, 242 (1985). See, also, the recent case of Harper v. Kelly, decided on October 10, 1990 in Second Circuit Court of Appeals which thoroughly analyzes the issue as it has developed in this Court over the years.

In 1990, this Court said, "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Maryland v. Craig,

___ U.S. ___, 110 S. Ct. 3157, 3163 (1990).

In Delaware v. Van Arsdall, 475 U.S. 673 (1986), this Court indicated that a Confrontation Clause error can be harmless only if, "assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." This Court disagreed with the holding in the lower court and found "that the state failed to meet its heavy burden of proving harmless error." [Emphasis supplied.] Van Arsdall indicates a number of factors to be considered in determining whether harmless error occurred. This case passes all the tests and thus the error clearly was not harmless.

In Olden v. Kentucky, 488 U,S. 227 (1988), this Court said, "Here, [witness'] testimony was central, indeed

crucial, to the prosecution's case. Pet. 35-38. The government did not have a case without Markowitz's testimony - so they bought him.

B. Rewrites and Mischaracterizes Presumption of Innocence Argument and Refers to Existing Law for Wrong Propositions

In its persistent effort to convince this Court that granting certiora in this case would be a waste of time, it baldfacedly alleges that the circuits do not agree on the Morgan issue. The Second Circuit, in this case, noted "that every circuit to have considered the issue [except the District of Columbia Circuit in United States v. White, 887 F.2d 267 (1989)] has agreed that guilt-assuming hypothetical questions should not be asked of character witnesses...." White depends on United States v. Lewis, 482 F.2d 632 D.C. Circuit which did not deal at all with hypothetical questions.

Respondent's casual approach to facts is difficult to deal with. It says petitioner did not place the Morgan issue before this Court. Res. 7. Petitioner wonders what is in the petition on pages 39-43. Respondent also says (Res. 9) petitioner does not make the argument that this sort of error should be per se reversible. Petitioner quotes from Page 42 of the petition "...violation by the trial court should be per se reversible."

C. Misrepresents Cumulative Error Argument by Answering Own Questions Instead of Those Originally Posed

Throughout its calculatedly off-handed treatment of this case, respondent persists in ignoring that petitioner's final argument is that of cumulative error which prevented petitioner from having a fair trial. The "summary chart" argument chart" was continuously coupled with all of the other

multitude of evidentiary and procedural errors that occurred at trial. United States v. Citron, 783 F.2d 307 (2d Cir. 1986) is also misrepresented to this Court. It is very strong precedent for petitioner. The prosecution's figures never approached reality. Pet.44-47 Because the district court tolerated the prosecution's gamesmanship, the enormous chart with its enormous numbers was in front of the jury for ten days. The necessity to disprove its accuracy (a job that was never completed) before the jury ground the fantastically inflated numbers into their minds.

CONCLUSION

The petiton for a writ of certiorari should be granted.

Dated: April 11, 1991

Respectfully submitted,

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